

The Spanish Constitutional Court on the Path of Self-Destruction

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Recently, the Spanish Constitutional Court has published [one more decision in application of the new reform of the Law on Constitutional Court](#) which increased its powers for the execution of its own decisions. This time the Court declared the unconstitutionality of a declaration by the Catalan Parliament stating the support for Catalonia to start the legal and political process for its independence from Spain and for having a referendum about it. At the same time, the court refers the files to the prosecutor in order to allow him asking for criminal prosecution of the chair of the Parliament of Catalonia for allowing these discussions to take part. This is just the latest manifestation of a process of keeping independentist Catalan politicians in check by means of Court's decisions. This process has progressively hampered the legitimacy of the Court by transforming what should be its natural only competence: to control that juridical acts are not contrary to the Constitution.

Obviously, if the entire people of a territory wants to be independent there is no one to stop it. When the desire of independence becomes massive it sweeps away any juridical instance. However, this is not currently the situation in Catalonia. Even if the movement for independence enjoys much support in Catalonia it is not yet unanimous or absolutely majoritarian. In absence of a referendum, the results of last elections in Catalonia show a quite balanced situation with equivalent support for and against independence. Nevertheless, the Catalan institutions, controlled by separatist parties, are trying to launch a process leading to the independence of Catalonia.

Independence implies leaving the framework of Spanish law and to dictate own new laws. In this sense, it must be a political process. But at the same time, in these moments, the independence of Catalonia is promoted by the existing constitutional institutions. These institutions are based on the Spanish rule of law and Constitution and they must act according to current Spanish law. This is why the Spanish courts may legitimately control if the Catalan Government or Parliament respect the rules and limits of the Spanish legal framework in their pro-independence activity.

So, when in 2014 the Catalan Parliament wanted to launch a consultative referendum to ask the population about the subject, [it was annulled by the Constitutional Court](#). According to the current distribution of territorial competences between the central state and the *Comunidades Autónomas* in the Spanish Constitution, the power to call for a referendum belongs exclusively to the central institutions for all Spain. The decision was fully correct and adequate.

However, this case made the Spanish Government understand the enormous political advantages of stopping the 'separatist challenge' through the Constitutional Court's judgements. It is an apparently independent judicial institution. It is the supreme interpreter of the Constitution, its decisions appear to be part of constitutional law, enjoying the same respect among all the country. And to confront a judgment of the Court would be presented as an illegal action. At the same time, the parliamentary appointment of the justices of the Court ensures that they will follow the line of the Government in these sensitive matters. So, the Court seemed to be the ideal tool for breaking any Catalan sovereignist initiative without the Government being exposed to a more than a minimum of political wear and tear.

Shortly afterwards, the Spanish Government challenged before the Constitutional Court a system of internet consultation set up by Catalonia. The challenge included also some political statements of the Catalan Parliament. The inconvenience was that in these cases it was not possible to find any breach of the constitutional division of powers and competences between the Union and the territories. All these questions were

rightly competences of the Catalanian Parliament, and the Government had to attack them based on substantive arguments. And there started the problems for the Spanish Constitutional Court.

The case of the internet consultations was solved by stating that there are questions that cannot be asked in any case or any way. The Constitution does not allow to request a pronouncement of any type from the people regarding questions already solved in the Constitution. These questions include the configuration of the constituent body. The Court invented the dogma of the Unity of the sovereign and stopped any attempt of asking the people about it, even in view of a future Constitutional reform.

Then, entering a political area that should be off-limits to it, the Court also accepted to adjudicate a symbolic political declaration of the Catalanian Parliament without any legal effect. The Parliament had expressed a political position in favour of independence and the Constitutional Court overturned that statement. There was not any legally binding act, not any infraction, not any Spanish regulation breached, just a rhetorical declaration nullified because of its content.

These decisions are damaging the position of the Constitutional Court as the guarantee of the Constitution and as an arbiter between powers. They alter its function, which is only to identify and overrule legal acts contrary to the Constitution. It should not take part in political controversies or influence the debate about a future constitutional reform. The social and political debate regarding how to amend the Constitution must be free as far as it stays a debate and does not infringe the current legal framework. Political options demanding a new constitutional order cannot be stopped as long as their ideology is not transformed into facts. By throwing itself in the way of the political challenge of independence, the Court only damages its own prestige and legitimacy.

Yet the Government did not stop here. A further step was taken in order to enhance powers of the Court against separatists. The Law on the functioning of the Constitutional Court was reformed to give it the capacity to overrule any act contrary to its doctrine, even by its own, and to punish the public officers responsible of it. The reform was controversial even internationally. However, the Court is using this new competence without any self-restraint and mostly in a perverse way: since the constitutional vice of the rhetorical declarations lies in the ideology that they reflect, the Court understands that any new declaration based on similar ideological values as a disobedience to his judgment. So, it can be annulled in a tremendously fast process (the execution of sentences) and their authors may be punished, as happens in this new case. In practice the Constitutional Court has banned the Parliament to speak in favour of a future hypothetical independence. And every time that a statement on this is made it will be automatically overruled in a process for executing the main previous decision.

It is clear that Catalanian sovereignist politicians are acting irresponsibly and provoking the Spanish powers. The only good way to answer to this challenge is a balanced and neutral response of the Constitutional Court every time they adopt an illegal act. Instead, the Court assumed a political role. He tries to stop even any talk about independence. By doing so, it fails to respect its own role as keeper of a Constitutional framework where very diverse ideologies can be discussed. Turning itself into a judge of the symbolic the Court imposes on the future a single political interpretation of the Constitution and hampers future reforms of it. It ceased to be a judge and became a party.

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SUGGESTED CITATION Urías, Joaquín: *The Spanish Constitutional Court on the Path of Self-Destruction*, *VerfBlog*, 2017/4/24, <http://verfassungsblog.de/the-spanish-constitutional-court-on-the-path-of-self-destruction/>, DOI: <https://dx.doi.org/10.17176/20170424-104310>.